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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUBEN QUINTANAR VARELA, Defendant and Appellant.	E045628 (Super.Ct.No. FVI020110) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ruben Quintanar Varela appeals his conviction of the misdemeanor offenses of battery (Pen. Code, § 242) and resisting an officer (Pen. Code, § 148, subd. (a)).[1] Defendant contends: (1) the trial court erred by instructing the jury with CALCRIM No. 3471 as to self-defense in mutual combat or as initial aggressor; (2) the trial court erred by instructing the jury with CALCRIM No. 3472 as to self-defense in a contrived fight or quarrel; (3) the cumulative effect of the two instructional errors deprived him of his due process right to a fair trial; (4) this court should conduct an independent in camera examination of the sealed records to determine whether the trial court erred in its conclusion that the documents in the deputy's personnel file were not discoverable in connection with defendant's *Pitchess*[2] motion; and (5) defendant's trial counsel was ineffective for requesting that the jury be instructed with CALCRIM Nos. 3471 and 3472. We find no reversible errors, and we affirm the judgment.

II. FACTS AND PROCEDURAL BACKGROUND

On August 31, 2004, Deputy Robert Johnston of the San Bernardino County Sheriff's Department was dispatched to defendant's property on Cottonwood Street in Victorville to investigate a reported disturbance. Deputy Johnston arrived at the

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[1] Defendant notes that the trial court's minute order mistakenly states defendant was convicted of violations of sections 243, subdivision (b), and 148, subdivision (b). The jury instead found defendant guilty of the lesser included offenses to those charges. The People concede that the minute order should be corrected to reflect defendant's conviction of the lesser included offenses in counts 2 and 3, and we accept that concession.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

residence and spoke with defendant's tenant, Ms. Netherton, who had called the sheriff complaining of other tenants at the property.

Defendant arrived while Deputy Johnston was speaking with Ms. Netherton on the porch of the home. Defendant identified himself as the landlord and repeatedly told the deputy to leave the property. Defendant advanced toward Deputy Johnston until defendant bumped into the deputy with his stomach. Deputy Johnston then pushed defendant in an effort to open up space between them and maintain a "stance of command presence." Defendant pushed the deputy back, and the deputy informed defendant that he was under arrest for interfering and putting his hands on an officer. Deputy Johnston reached toward defendant in an attempt to place him under arrest, and defendant swung at the deputy, knocking off the deputy's glasses. Defendant appeared to prepare to take another swing at the deputy, who then deployed his Taser gun on defendant. The two began to struggle on the ground. At one point, defendant reached up and pulled the Taser out of Deputy Johnston's hand, disarming him briefly. Defendant soon fatigued, and Deputy Johnston was able to handcuff him and put him into the back of the patrol car.

Defendant testified that he attempted to enter the gate to speak with the residents but was stopped by Deputy Johnston, who then hit defendant in the chest. Defendant told Deputy Johnston that he was "making a citizen's arrest" and told the deputy not to hit him anymore because he was ill. The deputy then told defendant that he was being placed under arrest. Deputy Johnston continued to bump into defendant with his forearm and chest until defendant's back gave out and he began to fall. Defendant grabbed the

deputy to keep from falling, and the deputy deployed his Taser. Defendant fell to the ground, and the deputy continued to Taser him. The deputy hit defendant in the head with the bottom of the Taser and then handcuffed him, picked him up, and put him in the back of the patrol car. Defendant stated that he never raised his hands or tried to hit the deputy.

Defendant further testified that he had been disabled three years prior in an accident at work when an "80-ton machine" fell on him, destroying all of the muscles in his left arm, injuring three vertebrae, and causing periodic swelling in his leg. He was also being treated for carpal tunnel syndrome in his left hand and was advised by his doctors to ride a bicycle for therapy. Defendant had a hernia as well.

The jury found defendant not guilty of resisting an executive officer with force or violence (Pen. Code, § 69, count 1), guilty of the lesser included offense of simple battery (Pen. Code, § 242, count 2), and guilty of the lesser included offense of resisting an officer (Pen. Code, § 148, subd. (a), count 3).

The trial court suspended the imposition of judgment, placed defendant on probation for 36 months, and ordered him to perform 500 hours of community service.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Instructional Error in Giving CALCRIM Nos. 3471 and 3472

Defendant contends the trial court erred by instructing the jury with CALCRIM Nos. 3471 and 3472, thereby denying him his rights to present a defense, to due process of law, and to a fair trial. Defendant argues there was no evidence of mutual combat in

the record, and therefore, CALCRIM No. 3471 had no application to the facts of the case and was given in error. Defendant further argues that CALCRIM No. 3472 misled the jury to believe that he was foreclosed from raising a self-defense claim. He also contends the cumulative effect of the challenged instructions was prejudicial.

1. Standard of Review

"Errors in jury instructions are questions of law, which we review de novo. [Citation.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) """[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."""" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; see also *People v. Young* (2005) 34 Cal.4th 1149, 1202)

2. Background

Defense counsel requested that the jury be instructed as to self-defense. The prosecutor objected on the ground that the evidence did not support a self-defense theory because defendant had denied offering any resistance to the deputy. The trial court stated that the word "scuffle" had been used in testimony, which implied "use of some kind of resistance," and self-defense instructions were therefore appropriate. The trial court also stated that if the jury believed the deputy had unnecessarily or unreasonably Tasered defendant, then defendant might have had a right in self-defense to take the Taser away from the deputy.

The trial court instructed the jury on self-defense, including with CALCRIM Nos. 3471 and 3472. CALCRIM No. 3471 provides: "A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] AND [¶] 2. He indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight." CALCRIM No. 3472 provides: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

3. Invited Error

The People contend that defendant invited any error by requesting the instructions and therefore cannot gain reversal on appeal. The doctrine of invited error is intended to prevent a defendant who urged the trial court to commit an error "from gaining a reversal on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) "If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham*, *supra*, at p. 330.) Instructional error is invited error when the record shows that "counsel made a conscious, deliberate tactical choice between having the instruction and not having it." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, however, defendant has raised the alternative contention that his trial counsel provided ineffective assistance by requesting the instructions defendant now

challenges. To dispose of that issue, we must necessarily examine whether giving the challenged instructions was erroneous, and the People have fully briefed the issue on the merits. We will therefore exercise our discretion to reach the merits of defendant's challenge to the instructions.

4. CALCRIM No. 3471

Defendant contends there was no evidence to support that portion of CALCRIM No. 3471 dealing with mutual combat, and the trial court compounded the error by failing to explain or clarify the narrow legal definition of the term. As the court explained in *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*), the doctrine of mutual combat "applies only to a violent confrontation conducted pursuant to prearrangement, mutual consent, or an express or implied agreement to fight." (*Id.* at p. 1036.) We agree with defendant that none of those circumstances was shown by the evidence in the instant case.

Defendant argues, based on *Ross*, that his conviction must be overturned because instructing the jury on mutual combat when no evidence supported the instruction was prejudicial error. However, *Ross* is distinguishable on its facts. In that case, the instruction given, CALJIC No. 5.56, differed significantly from CALCRIM No. 3471, in that the first sentence of CALJIC No. 5.56 read, "'The right of self-defense is only available to a person who engages *in mutual combat* if he has done all of the following . . . .'" (*Ross*, *supra*, 155 Cal.App.4th at p. 1042, fn. 9, italics added.) In *Ross*, no evidence supported giving the instruction.

Here, in contrast, the challenged instruction read: "A person who engages in mutual combat *or who is the first one to use physical force* has a right to self-defense only if . . . ." (CALCRIM No. 3471, italics added.) The instruction was properly given because there was evidence showing that defendant had been the first one to use physical force: Deputy Johnston testified that defendant stepped back, took a boxer's stance, and told the deputy "it's on" or "let's go." When the deputy told defendant he was under arrest and attempted to seize him, defendant swung his fist at the deputy and knocked his glasses off. Thus, giving CALCRIM No. 3471 was appropriate. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) Under the state of the evidence, the jury would have been required to find that, if defendant was the initial aggressor, he could assert self-defense only if he had tried to stop fighting and had communicated that desire to his opponent. (CALCRIM No. 3471.) No evidence in the record would have supported such a finding. We therefore conclude that including the term "mutual combat" in CALCRIM No. 3471 was mere surplusage. Any resulting error was harmless under both the state error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, and the federal error standard of *Chapman v. California* (1967) 386 U.S. 18.

5. CALCRIM No. 3472

Defendant contends it was error to instruct the jury with CALCRIM No. 3472 because no evidence supported giving that instruction. The trial court must instruct the jury on all the general principles of law that govern the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The trial court has a sua sponte duty to instruct on the

affirmative defense of self-defense if substantial evidence supports that defense, and the defense is not inconsistent with the defendant's theory of the case. (*Id.* at p. 157.)

Here, evidence in the record indicated defendant had provoked a fight with Deputy Johnston with the intent to create an excuse to use force. Deputy Johnston testified that defendant arrived when the deputy was speaking to Ms. Netherton, and defendant repeatedly told the deputy to leave the property. Defendant became argumentative and repeatedly interrupted the deputy's conversation with Ms. Netherton. The deputy approached defendant, who stepped forward and bumped the deputy's stomach. The deputy pushed back, and defendant pushed the deputy harder. When the deputy told defendant he was under arrest, defendant took a boxer's stance and made a challenging remark. Defendant threw the first punch. From that evidence, the jury could reasonably infer that defendant provoked a fight with the deputy with the intent to create an excuse to use force. There was no error in instructing the jury with CALCRIM No. 3472.

6. Cumulative Effect of Instructions.

Defendant contends the cumulative effect of giving the challenged instructions was prejudicial. We have concluded that the trial court did not err in instructing the jury with CALCRIM No. 3472 and that any error in including the term "mutual combat" in CALCRIM No. 3471 or in failing to explain or define that term was harmless. The cumulative error doctrine does not apply to a single error.

B. Ineffective Assistance of Counsel

In the alternative, defendant contends trial counsel was ineffective for requesting that the jury be instructed with CALCRIM Nos. 3471 and 3472, because there was no

evidence to support those instructions, and they severely limited his defense of self-defense.

1. Standard of Review

To establish a claim of ineffective assistance of counsel, the defendant must demonstrate both that (1) counsel's representation was deficient—in other words, that counsel committed such serious errors in representation as to deprive defendant of his Sixth Amendment guarantee of counsel, and (2) that this deficient performance prejudiced the defense and, but for this deficiency, it is reasonably probable that the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Because, as discussed above, giving the challenged instructions did not result in prejudice, defendant has failed to establish the second prong of the *Strickland* test. His challenge to the effectiveness of his representation at trial is therefore meritless.

C. Abuse of Discretion Regarding Discoverability of Personnel File

Defendant requests this court to independently review the sealed records to determine if the trial court erred in its conclusion regarding discoverability of personnel documents in connection with his *Pitchess* motion.

1. Standard of Review

A motion for discovery of peace officer personnel records is "addressed solely to the sound discretion of the trial court . . . ." (*Pitchess, supra*, 11 Cal.3d at p. 535.) "'A review of the lower court's ruling is subject to an abuse of discretion standard.'" (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145, quoting *People v. Gill* (1997) 60 Cal.App.4th 743, 749.)

2. Background

On August 14, 2007, defendant filed a *Pitchess* motion for discovery of Deputy Johnston's personnel files. The sheriff's department filed an opposition. The trial court concluded that defendant had established good cause for review of the files, and the trial court held an in camera review of the files with the custodian of records, determined the files did not contain any discoverable materials, and filed a transcript of the review hearing under seal.

3. Analysis

"'"In criminal cases, the court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest."' [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 670-671.) "[O]nly documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery. [Citations.]" (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

Defendant alleged unlawful arrest and excessive use of force by Deputy Johnston. We have examined the sealed transcript of the review hearing and have determined that it does not disclose information that would be discoverable to defendant. Thus, we find no abuse of discretion.

D. Correction of Minute Order

Defendant contends the April 10, 2008, minute order incorrectly states that he was convicted of the original charged offenses in counts 2 and 3 and should be corrected to

reflect his conviction of the lesser included offenses on those counts. The People concede the need for such correction. Thus, we will direct the trial court to amend the minute order accordingly.

IV. DISPOSITION

The trial court is directed to correct the April 10, 2008, minute order to reflect the defendant's conviction of the lesser included offense of simple battery (§ 242) on count 2 and the lesser included offense of resisting an officer (§ 148, subd. (a)) on count 3. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.